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## Study on the extent to which climate change policies and projects adhere to the standards set forth in the United Nations Declaration on the Rights of Indigenous Peoples

**Note by the secretariat**

*Summary*

At its seventh session, the Permanent Forum on Indigenous Issues appointed Mr. Hassan Id Balkassm and Ms. Paimaneh Hasteh, members of the Permanent Forum, as special rapporteurs to undertake a study to determine whether climate change policies and projects adhere to the standards in the United Nations Declaration on the Rights of Indigenous Peoples. At the eighth session of the Permanent Forum, Mr. Id Balkassm and Ms. Hasteh presented a concept paper outlining the framework for the study (E/C.19/2009/5). Mr. Id Balkassm and Ms. Hasteh were of the view that the impact of climate change mitigation measures on indigenous peoples and on their land, territories and resources highlights the extent to which climate change threatens indigenous peoples, particularly since the participation of indigenous peoples in climate change law and policies remains deficient. The study builds on the concept paper by Mr. Id Balkassm and Ms. Hasteh, examining in more detail whether current and proposed climate change policies and projects adhere to the Declaration.

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# I. Climate change

1. The definition of climate change under the United Nations Framework Convention on Climate Change is: "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods".[1]

2. Climate change is mainly caused by greenhouse gas emissions,[2] owing largely to the increase in the combustion of fossil fuels.[3] The Intergovernmental Panel on Climate Change posits that causes of temperature rise include human activity, including power generation, deforestation, transport, agriculture and industry.[3]

3. Existing and projected changes as a result of climate change include:[3]

- Contraction of snow-covered areas and sea ice
- Sea-level rise and higher water temperatures
- Increased frequency of hot extremes
- Heavy precipitation events and increase in areas affected by drought
- Increased intensity of tropical cyclones.

# II. International climate change law and policy

4. The Framework Convention, agreed in 1992, provides the framework for the international response to climate change.[4] It does not set out specific obligations and strategies, which are to be addressed under subsequent agreements. It aims to "stabiliz[e] greenhouse gas concentrations in the atmosphere at a level that will prevent dangerous [...] interference with the climate system" (article 2). The Framework Convention has been ratified by 192 States.

5. International climate change law and policy revolves around the twin strategies of mitigation (a reduction of greenhouse gas emissions) and adaptation (an increase in the capacity to adapt to climate change). Under the Framework Convention's equity principle, developed States, as the principal producers of greenhouse gases historically and the most resource rich, are to carry a heavier burden in mitigation and adaptation strategies, including assistance to poorer countries and the development of technology.

6. The Kyoto Protocol to the Framework Convention[5] detailed international climate change measures between 2008 and 2012, setting mandatory greenhouse gas emission targets for developed States, establishing mechanisms to achieve this,

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[1] United Nations, *Treaty Series*, vol. 1771, No. 30822.

[2] Intergovernmental Panel on Climate Change, "Climate change 2007 — synthesis report", adopted by Plenary XXVII (2007).

[3] Ibid., *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the IPCC*, S. Solomon and others, editors (Cambridge, Cambridge University Press, 2007).

[4] D. Freestone, "The international climate change legal and institutional framework: an overview", *University of New South Wales Faculty of Law Research Series*, No. 38 (2009).

[5] United Nations, *Treaty Series*, vol. 2303, No. 30822.

including carbon trading and the clean development mechanism (permitting developed States to achieve their emissions targets through investment in emissions reductions in developing States) and developing monitoring, reporting and verification measures. It is ratified by 190 States.

7. In 2007 the parties to the Framework Convention adopted the Bali Action Plan under which they were to reach agreement on, at the end of the fifteenth session of the Conference of the Parties in 2009, long-term emissions reductions, mitigation and adaptation strategies, technology transfer and development and appropriate financing and investment.[6]

8. The fifteenth session of the Conference of the Parties to the Framework Convention did not reach a final agreement on all issues, nor on proposals for the reduced emissions from deforestation and degradation (REDD) (deforestation and forest degradation has been estimated to contribute 18 per cent of annual emissions of carbon dioxide),[7] although a REDD agreement is close to being finalized. However, the majority of States agreed in the Copenhagen Accord, for example, that most developed States commit to implement emissions targets and provide resources.

9. International climate change policy and law are highly politicized. The competing interests behind positions on climate change translate into numerous contentious issues such as contests over scientific assessments of the severity, and potential severity, of climate change. Developed States are particularly concerned with the economic burden associated with responding to climate change. Developing States seek not to be hampered in their development by restrictions on their use of energy when developed States were not so hampered, citing discrimination, but simultaneously see their interests align with measures to mitigate and adapt to climate change. The lowest carbon emitters with the greatest vulnerability to climate change impacts, including small island developing States, are some of the States calling for stronger commitments. Oil-producing States are concerned about the economic impact of lower oil use resulting from climate change mitigation measures. Consequently, climate change policy may be determined as much by political compromise as by the need to reduce the impacts of climate change.

10. A number of climate change mitigation and adaptation measures have been implemented already from bodies as diverse as the Global Environment Facility, the World Bank to the United Nations to State development funds. These include the establishment of funds to implement and manage mitigation and adaptation strategies, carbon markets, emissions offset regimes, caps on carbon emissions, pilot REDD mechanisms and so on.[4] There are also a number of voluntary carbon offset measures being developed and implemented at the sub-State level. Domestic regulatory regimes to address climate change vary.

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[6] Outcome of the thirteenth session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, decision 1/CP.13 (Bali Action Plan).

[7] See Meridian Institute, "Reducing emissions from deforestation and forest degradation (REDD): an options assessment report", prepared for the Government of Norway, 2009.

## III. Climate change and indigenous peoples

11. Many indigenous peoples face the most critical consequences of climate change. Climate change can aggravate already difficult situations experienced by indigenous peoples, as some of the poorest and most marginalized groups in the world, often also living in areas most affected by rising temperature. As already stated, "[i]ndigenous peoples, who have the smallest ecological footprints, should not be asked to carry the heavier burden of adjusting to climate change".[8] A sketch of the climate and environmental changes, local observations and impacts being felt by indigenous peoples in different regions, and an outline of the various adaptation and mitigation strategies that are currently being implemented by communities as they use their traditional knowledge and survival skills to trial adaptive responses to change is available in the *Advance Guard Compendium* for further reading.[9]

12. Climate change mitigation and adaptation measures potentially impact on indigenous peoples' rights. For example, REDD policies can particularly affect indigenous peoples given they oftentimes inhabit forested areas, their close relationship to forests, as the environment that sustains them, and their use and conservation of them. There is a concern that REDD credits-based systems could lead to land-grabs of indigenous forested territories, and their conversion into plantations.[10] Criticisms have already been levelled at international REDD policies, including those that are required to comply with some indigenous peoples' rights standards,[11] such as the World Bank,[12] and the United Nations Collaborative Programme on Reducing Emissions and Forest Degradation in Developing Countries (UN-REDD Programme) (although the obligation stems from policy rather than rules).[13] On the other hand, well-designed REDD-related forestry programmes can also support indigenous peoples' rights, discussed below.

13. Indigenous peoples have participated to varying degrees in international and domestic climate change measures. Their inclusion in policy and law formation is not always guaranteed. Indigenous peoples' participation appears to be increasing in some climate change-related initiatives at the international level, such as those established by the World Bank and under UN-REDD, sometimes in response to indigenous peoples' demands for inclusion.[10]

14. Numerous indigenous peoples participated in the fifteenth session of the Conference of the Parties to the Framework Convention, and language referencing the need for indigenous peoples' and local communities' engagement to be included

[8] See *Official Records of the Economic and Social Council, 2008, Supplement No. 43* (E/2008/43), para. 6; also report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (A/HRC/10/61), para. 51.

[9] Kirsty Galloway McLean, *Advance Guard: Climate Change Impacts, Adaptation, Mitigation and Indigenous Peoples — A Compendium of Case Studies* (United Nations University Institute of Advance Studies Traditional Knowledge Initiative, Darwin, Australia, 2010).

[10] International Institute for Environment and Development Briefing "COP 15 for journalists: a guide to the UN climate change summit" (November 2009).

[11] Tom Griffiths, "Seeing 'REDD'? forests, climate change mitigation and the rights of indigenous peoples and local communities", Forest People's Programme, 2008.

[12] World Bank Revised Operational Policy and Bank Procedure on Indigenous Peoples OP/BP 4.10 (2005).

[13] UN-REDD Programme, Global Indigenous Peoples' Consultation on the topic "Reducing Emissions from Deforestation and Degradation", held in Bagris City, Philippines, 12-14 November 2008.

in a draft REDD agreement, included references to the Declaration on the Rights of Indigenous Peoples.[14] However, indigenous peoples continue to call for more comprehensive reference to indigenous peoples' rights in all documents of the Conference of the Parties.[15]

15. Indigenous peoples have much to offer in terms of best practices for mitigation and adaptation measures to combat climate change if they are included in related international law and policy development, especially if they comply with indigenous peoples' rights.

16. Indigenous peoples have consistently called for climate change policy and law to comply with indigenous peoples' rights as set out, for example, in the Declaration.[16] They have also called for indigenous peoples' inclusion in the formation and implementation of climate change policy and law at both the domestic and international level, and that indigenous peoples' governing bodies have the "right to enact such laws and regulations as appropriate and adopt mitigation and adaptation plans within their jurisdictional authority [...]".[16]

17. Indigenous peoples' responses to climate change have been articulated in a number of instruments, reports and attempts at international litigation, not least in the Anchorage Declaration of the Indigenous Peoples' Global Summit on Climate Change held in Anchorage, Alaska in April 2009.

18. Indigenous peoples' views of some aspects of climate change laws and policies differ. As Tauli-Corpuz has stated, there is no one indigenous position on emissions trading.[17] Consistently with an indigenous peoples' right to self-determination, each peoples' perspective commands respect.

19. Some indigenous peoples philosophically object to market-based climate change policies on the grounds that they commodify interests in, for example, trees, undermining their cultural and spiritual value. There is also an objection to trading schemes that permit continued greenhouse gas emissions, for example, by offsetting those practices against the retention of carbon sinks, such as forests. Other indigenous peoples see opportunities in climate change mitigation and adaptation policies, including market-based initiatives and the use of resources on their lands, for their much-needed economic, social and cultural development.

## IV. Climate change and human rights

20. International human rights law does not clearly articulate a right to a sustainable environment (with the exception of environmental guarantees in some regional instruments).[18] However, numerous rights are impacted by climate change, especially in the indigenous peoples' context.

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[14] Outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, 15 December 2009, available from http://unfccc.int/resources/docs/2009/awglca8/eng/l07a06.pdf.

[15] International Indigenous Peoples Forum on Climate Change, final statement at the fifteenth session of the Conference of the Parties, 31 December 2009.

[16] International Indigenous Peoples Forum on Climate Change, statement of 27 September 2009.

[17] V. Tauli-Corpuz, "Indigenous peoples and carbon trading", *REDD-Monitor* (8 April 2009).

[18] P. Havemann, "Ignoring the mercury in the climate change barometer: denying indigenous peoples' rights", *Australian Indigenous Law Review*, vol. 13, No. 1 (2009).

21. There are difficulties in framing climate change impacts as human rights issues. As the Office of the High Commissioner for Human Rights has pointed out, it is difficult to frame climate change effects as human rights "in the strict legal sense" given the "complex causal relationships" between emissions and effect.[19] Moreover, "adverse effects of global warming are often projections about future impacts, whereas human rights violations are normally established after the harm has occurred".[20] The financial burden imposed on States to mitigate and adapt to climate change impacts could lessen the capacity of States to realize economic, social and cultural rights.[20]

22. The international system, including civil society, has already concluded considerable work on the relationship between climate change and human rights, calling for a human rights consistent approach.[21]

## V. The obligation to comply with the Declaration

23. The Declaration is the most universal, comprehensive and fundamental instrument on indigenous peoples' rights and forms a part of human rights law.

24. The juridical force of "soft law instruments", which are not formally legally binding, is contestable, as are the boundaries between "soft law" and "hard law", which is legally binding as a matter of formal international law. Moreover, the question whether international bodies, such as the Conference of the Parties to the Framework Convention, are bound by international human rights law remains contested, not least because human rights generally and principally only impose legal obligations on States.[22]

25. Nonetheless, there are compelling legal and political reasons why international and domestic climate change law and policy ought to comply with the Declaration. As the Permanent Forum has stated, "[t]he binding value of the Declaration must be seen in the wider normative context of the innovations that have taken place in international human rights law in recent years".[23]

26. The Charter of the United Nations states, in Article 1, paragraph 3, as one of the principal objectives of the Organization, the achievement of "international cooperation [...] in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. Any actions undertaken under United Nations auspices, including those to address climate change, should seek to implement the "constitutional" objectives of its Charter, including the Declaration as a component of the corpus of international human rights.

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[19] A/HRC/10/61, para. 70; J. Knox, "Climate change and human rights law", *Virginia Journal of International Law*, vol. 50, No. 1 (2009).

[20] A/HRC/10/61, para. 70.

[21] For example, Deputy United Nations High Commissioner for Human Rights "Climate change and human rights", address of the thirteenth session of the Conference of the Parties to the Framework Convention, December 2007.

[22] A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, Oxford University Press, 2006).

[23] See *Official Records of the Economic and Social Council, 2009, Supplement No. 43* (E/2009/43), annex, para. 6.

27. The Declaration has institutional legitimacy as an embodiment of the collective will of the United Nations General Assembly.

28. The Declaration also acquires legitimacy from the processes from which it was developed, the participation of indigenous peoples in the negotiations, the substance of the Declaration and the extent to which States, State bodies, international institutions, transnational advocacy groups, civil society and indigenous peoples have engaged with it. The Declaration was developed over a 20-plus-year period following a robust process. Equally, the participation of States and indigenous peoples from all regions of the world, international institutions, the academy and civil society in negotiations on the Declaration reflect that it is the outcome of inclusive deliberative processes, justifying its authority.[24] The rights expressed in the Declaration embody the justice of indigenous peoples' claims in the light of the historical denial of their international juridical status and their experiences of oppression.[25] Finally, the Declaration's legitimacy is reflected in, and enhanced by the interaction of State, international institutional, non-State actor and indigenous peoples with it in political and legal settings. For example, international human rights bodies,[26] United Nations bodies,[27] State courts,[28] and indigenous peoples, inter alia, have applied, or sought to apply, the Declaration in a vast array of circumstances. These interactions reflect a "common body of opinion regarding the content of the rights of these peoples".[29]

29. Article 42 of the Declaration stipulates that the United Nations and States "shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration". The Framework Convention institutions and States that participate in the making of international and domestic law and policy on climate change are therefore, under the Declaration, required to promote respect for, and the full application of, the Declaration.

30. The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people stated "some aspects of the provisions of the Declaration can also be considered as a reflection of norms of customary international law".[30]

31. General principles of international law are also a binding source of international law recognized in Article 38, paragraph 1, of the Statute of the International Court of Justice. As has been noted, "[a]cts and declarations of a non-binding nature promulgated by international organizations are a good source" of

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[24] J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by W. Rehg (Cambridge, Massachusetts, MIT Press, 1998).

[25] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, Cambridge University Press, 2004).

[26] For example, the Committee on the Elimination of Racial Discrimination in relation to the United States, document CERD/C/USA/CO/6, and the Human Rights Council in its Universal Periodic Review of States.

[27] For example, the United Nations Development Group, *Guidelines on Indigenous Peoples' Issues*, 2008.

[28] *Cal and others v. the Attorney General of Belize and the Minister of Natural Resources and the Environment*, 2007, Claims Nos. 171 and 172 of 2007.

[29] Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (A/HRC/9/9), para. 18.

[30] Ibid., para. 41.

general principles of international law.[31] Certain norms in the Declaration have been recognized as reflecting general principles of international law, such as land rights by the Supreme Court of Belize.[32]

32. The Declaration specifically applies to indigenous peoples' many existing human rights norms articulated in binding international human rights treaties. For example, the Inter-American Court of Human Rights and the Committee on the Elimination of Racial Discrimination have applied the right to freedom from discrimination together with property rights to require respect for indigenous peoples' communal and customary land title, consistently with the Declaration.[33] To the extent that the Declaration reflects and influences interpretations of international human rights treaties, it is, and can be, applied as binding international law.

33. States' policies and laws on climate change will come under human rights scrutiny, including assessments of their conformity with the Declaration. For example, the Human Rights Council, in its universal periodic review, has called upon States to support the Declaration where they have not done so already.[34] The Committee on the Elimination of Racial Discrimination has already assessed States' compliance with human rights treaties with reference to the Declaration,[35] and specifically in relation to climate change policies allegedly causing a negative impact on indigenous peoples.[36] The Permanent Forum will also assess the effectiveness of the Declaration,[37] and the International Labour Organization (ILO) monitoring bodies apply similar norms under the ILO Convention on Indigenous and Tribal Peoples in Independent Countries (No. 169).

34. To the extent that States are bound by human rights under domestic law, sourced in international, constitutional, legislative, executive or judicial norms, they are required to conform to human rights, which can include Declaration rights, especially where a consistent interpretation is possible.

35. The Framework Convention was adopted in the context of significant international policymaking on the environment in Rio de Janeiro in 1992, also including the Rio Declaration and Agenda 21,[38] which included indigenous peoples, guarantees for the protection of their rights, and acknowledgement of the interrelationship between indigenous peoples' well-being and the environment.[39]

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[31] S. Perkins, "International Human Rights Law and Article 38 (1) of the Statute of the International Court of Justice", in Schaffer and Snyder (eds.), *Contemporary Practice of Public International Law* (Dobbs Ferry, New York, Oceana Publications, 1997).

[32] See footnote 28 above, para. 127.

[33] For example, Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Ser. C (No. 172) (2007); ibid., *Mayagna (Sumo) Awas Tingni Cmty v. Nicaragua*, Ser. C (No. 79) (2001).

[34] For example, Draft report of the Working Group on the Universal Periodic Review: New Zealand (A/HRC/WG.6/5/L.7).

[35] For example, see footnote 26 above.

[36] Committee on the Elimination of Racial Discrimination in relation to Indonesia, document CERD/C/IDN/CO/3, para. 17.

[37] See *Official Records of the Economic and Social Council, 2009, Supplement No. 43* (E/2009/43), annex, para. 21.

[38] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, vol. I, *Resolutions adopted by the Conference*, United Nations publication, Sales No. E.93.I.8 and corrigendum, resolution I, annexes I and II.

[39] Ibid., annex I, Principle 22.

The Convention should comply with related instruments in particular, as a matter of robust and consistent policy.

36. While the Declaration may not be formally binding on the Framework Convention international institutional infrastructure as a matter of law, the efficacy of the international system as a whole requires that all the various international legal "subsystems" — including human rights and climate change — act consistently.[40] In other words, the authority of the international legal system requires that it reinforce itself by complying with international norms, even if they emanate from different sub-systems. Specifically, if the Convention and related agreements do not comply with other relevant international principles, such as those set out in the Declaration, it suggests that international law generally is not authoritative, to the detriment of the Convention, the Conference of the Parties and international legal system as a whole. The International Law Commission has recommended "systemic integration" between various international law sub-systems based on article 31, paragraph 3 (c), of the Vienna Convention on the Law of the Treaties that in interpreting a treaty, "there shall be taken into account [...] (c) any relevant rules of international law applicable in the relations between the parties".[41]

## VI. Climate change and indigenous peoples' rights

37. An assessment of climate change law and policy compliance with the Declaration is suggested here. It must be borne in mind that some of the effects of climate change remain unknown and climate change policy and law is evolving, making precise evaluation difficult. Analysis of specific domestic laws and policies would require further focused research.

38. Less focus is placed on generic human rights issues raised by climate change, and related mitigation and adaptation policies and law, such as those in relation to the right to life, health, food, housing and water. Such analyses have been undertaken in some depth already. Nonetheless, it must be recognized that all rights are indivisible, interdependent and interrelated,[42] as well as inalienable and inherent. Moreover, as mentioned, indigenous peoples are particularly vulnerable to human rights violations sourced in climate change as well as to strategies to mitigate and adapt to climate change.[43]

39. The Declaration "sets out several rights and principles of relevance to threats posed by climate change".[44]

40. Indigenous peoples have pointed out that they are "holders of collective rights, including sovereign and inherent rights to land and treaty rights, covenants and agreements. Protecting these rights also strengthens the capacity and resilience of indigenous peoples and local communities to respond to climate change".[15] They

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[40] Study Group of the International Law Commission on the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law" (A/CN.4/L.682 and Corr.1 and Add.1).

[41] United Nations, *Treaty Series*, vol. 1155, No. 18232.

[42] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993 (A/CONF.157/24 (Part I)), chap. III.

[43] See A/HRC/10/61.

[44] Ibid., para. 53.

have asserted their jurisdiction to make laws and policies to respond to climate change.[15]

41. Climate change mitigation and adaptation law and policy has the potential to be supportive of indigenous peoples' rights in that, if done in compliance with such rights, it can assist their realization by, for example, giving effect to indigenous peoples' self-determination and securing respect for indigenous peoples' lands, territories and resources.[45] Moreover, mitigation and adaptation measures could reduce the threats posed by climate change to indigenous peoples, supporting the rights in the Declaration. Indigenous peoples possess knowledge essential to responses to climate change, which a rights-based approach to climate change could seize. Such approaches are mandated in current REDD draft agreements.

42. Conversely, climate change and mitigation and adaptation measures could already, or in the future, lead to violations of the Declaration. Further, if climate change mitigation and adaptation measures are inadequate to combat climate change, States may also find themselves in violation of the Declaration.[46]

43. Overall, the philosophical premises underlying climate change mitigation and adaptation policy and law must be tested. States must be aware of indigenous peoples' sensitivity that climate change law and policy simply provides the latest justification for state assertions of control over indigenous peoples, a form of neo-colonialism/neo-domination.

44. Difficulties remain for indigenous peoples to enforce the Declaration or seek legal remedies where climate change law and policy does not comply. For example, while the UN-REDD Programme has committed to compliance with the Declaration, indigenous peoples do not have a direct avenue to enforce this commitment, except perhaps indirectly under the State-focused international human rights mechanisms.

**Indigenous peoples' right to participation**

45. Indigenous peoples' right to participate in international and domestic climate change policy and law-making and implementation has its genesis in human rights, indigenous peoples' rights and good governance, and is supported by much international and domestic theory and practice on law and policymaking.

46. An indigenous peoples' right to participate in domestic and international climate change policy and law formation arises out of numerous articles of the Declaration including, inter alia, articles 3-5, 18-20, 23, and 30-34.[47] Indigenous peoples' right to participate in decisions that affect them is set out in article 18 in particular, which states:

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own decision-making institutions.

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[45] V. Tauli-Corpuz and A. Lynge, "Impact of climate change mitigation measures on indigenous peoples and their territories and lands" (E/C.19/2008/10), para. 36.

[46] Survival International, "The most inconvenient truth of all: climate change and indigenous people", 2009.

[47] Report of the International Expert Group Meeting on Indigenous Peoples and Climate Change (E/C.19/2008/CRP.9).

47. The use of hypothetical language — "which would affect their rights" — suggests that indigenous peoples must participate before decisions are taken and even when there is only a potential impact on them, indicating the wide-application of the right. Article 18 also requires that indigenous peoples' own self-determining institutional and decision-making structures are the vehicles through which indigenous peoples must participate, consistently with an indigenous peoples' right to self-determination.

48. The right to participate is closely related to indigenous peoples' right to self-determination and right to free, prior and informed consent.[48] As a whole, they reflect that indigenous peoples, as peoples under international law, have the right to determine their own future, requiring participation in any and all relevant processes that have the potential to impact on them. It is a right to be exercised collectively, distinct from individuals' rights to participate in decision-making processes.

49. An indigenous peoples' right to participate is nonetheless supported by, and related to, general human rights and principles of good governance, such as that expressed in article 25 of the International Covenant on Civil and Political Rights. Indeed, a State's ability to represent indigenous peoples, as self-determining peoples, is difficult given that indigenous peoples are often non-dominant within States and have their own, or right to their own, autonomous decision-making structures.

50. Given its relationship to self-determination, and the international status that accrues to peoples, an indigenous peoples' right to participate applies to international law and policymaking, such as that undertaken under the auspices of the Framework Convention.

51. Consistently with the Declaration, the broader international environmental legal regime has set out standards requiring indigenous peoples' participation, as mentioned above. The Intergovernmental Panel on Climate Change Fourth Assessment Report stated that, "[i]ncorporating indigenous knowledge into climate change policies can lead to the development of effective adaptation strategies that are cost-effective, participatory and sustainable".[3] The Framework Convention, in article 6, mandates States to promote and facilitate "public participation in addressing climate change and its effects and developing adequate responses". Further, the current draft REDD negotiating text calls for the full and effective participation on indigenous peoples in REDD-related activities. The Permanent Forum recommended in 2008 that "[s]cientists, policymakers and the international community as a whole should undertake regular consultations with indigenous peoples so that their studies and decisions will be informed by indigenous peoples' traditional knowledge and experiences".[49] The Intergovernmental Arctic Council, also addressing climate change, has accredited a number of indigenous organizations as permanent participants, providing for "the active participation and full consultation with the arctic indigenous representatives".[50] The World Bank now calls for the inclusion of indigenous peoples in climate change law and policy.[51] The

[48] Report of the International Workshop on Methodologies regarding free, prior and informed consent and indigenous peoples (E/C.19/2005/3).

[49] See *Official Records of the Economic and Social Council, 2008, Supplement No. 43* (E/2008/43), para. 9.

[50] See http://arctic-council.org/section/the_arctic_council/.

[51] "World Bank affirms support to indigenous peoples in designing climate change responses", Press release No. 2010/149/SDN (18 November 2009).

UN-REDD Programme Policy Board includes indigenous peoples' representatives. The report of the High Commissioner on Human Rights states that "[p]articipation in decision-making is of key importance in efforts to tackle climate change",[52] before mentioning the Declaration's provisions on free, prior and informed consent. Equally, some domestic climate-change measures are providing for indigenous peoples' participation.[53]

52. Indigenous peoples' participation in international law-making is supported by precedent such as that in the Permanent Forum, the Expert Mechanism on the Rights of Indigenous Peoples, and within the World Intellectual Property Office, the Convention on Biodiversity,[54] and the Human Rights Council in particular. The right to participate is supported in wider human rights jurisprudence.[55] Moreover, ILO Convention No. 169 sets out, in article 6, obligations on States to enable indigenous peoples' participation in policies and programmes that concern them.

53. The right to participate is necessary to secure the authority of climate change law and policy for, and on, self-determining indigenous peoples, as well as other individuals and groups.[56] Inclusion ensures that international law and policy does not impose outcomes on indigenous peoples, given they are unlikely to support policies they have not considered. The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples has noted,

> without the buy-in of indigenous peoples [...], even [Government programmes] that are intended to specifically benefit indigenous peoples [...] can be crippled at the outset. Invariably, it appears that a lack of adequate consultation leads to conflictive situations, with indigenous expressions of anger and mistrust, which, in some cases, have spiralled into violence (A/HRC/12/34, para. 36).

54. Indigenous peoples' input is likely to result in better law and policymaking in the long run as it ensures the contribution of some of the most affected by climate change and corresponding mitigation and adaptation strategies, who best comprehend the problem, its consequences and the contextual and historical factors that will contribute to their solution. In this way, indigenous peoples' participation will also increase the level of expertise that goes into international law and policymaking on climate change.

55. Indigenous peoples have an interest in generic climate change law and policy formation and implementation because of their particular vulnerability to climate change, that indigenous peoples can share their best practices on climate change mitigation and adaptation techniques and that international climate change policy and law have the potential to significantly impact on their enjoyment of their rights. Under the Declaration, indigenous peoples are entitled to participate in, for

[52] A/HRC/10/61, para. 79.

[53] "Background Analysis of REDD Regulatory Frameworks", report for Terrestrial Carbon Group and UN-REDD (2009).

[54] See, in particular, the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, adopted by the Conference of the Parties at its sixth session.

[55] For example, see footnote 25 above.

[56] P. Habermas, quoted in A. Barron "Foucault and the Law" in J. Penner and others (eds.) *Introduction to Jurisprudence & Legal Theory: Commentary and Materials* (Oxford, Oxford University Press, 2002).

example, all international and domestic law and policy development to respond to climate change, including potential impacts and the gathering and preparation of research on climate change. Thus, indigenous peoples' participation should be provided for in, inter alia, the Conference of the Parties to the Framework Convention and related negotiations, subsidiary bodies such as those providing scientific and technological advice, and development of policies on REDD, including those launched by the United Nations, the World Bank and States.

56. Indigenous peoples have called for the establishment of "formal structures and mechanisms for and with the full and effective participation on indigenous peoples", including engagement of the International Indigenous Peoples' Forum on Climate Change in an advisory role.[57]

57. Indigenous peoples' right to participate is likely to grow stronger in more localized contexts as the potential that climate change law and policy will more concretely impact on indigenous peoples' rights increases. A report commissioned by UN-REDD states that "consultation with [indigenous peoples], as well as other stakeholders, is necessary to maintain the legitimacy and transparency of a proposed national or subnational REDD scheme".[52] At the domestic and especially the local level, indigenous peoples' right to participate could well, in many cases, translate into a right to free, prior and informed consent.

58. The participation of indigenous peoples in international law and policy formation and implementation of climate change, under the Declaration, requires funding.

59. Article 7, paragraph 6, of the Framework Convention provides for the participation of observers at the various meetings of the Conference of the Parties, including non-governmental organizations. Some indigenous peoples' organizations have acquired observer status.

60. In practice, however, indigenous peoples were not adequately consulted in the creation of the Framework Convention or in Kyoto Protocol negotiations, and have had to resort to protest to facilitate their appropriate inclusion into international climate change policy and law formation. Calls for more robust participation mechanisms, such as an expert group on indigenous peoples and climate change, have been rejected. In a positive signal, which must be continued and expanded, indigenous peoples' organizations addressed the plenary of States in a meeting in Bali in September 2009, have met with the chairs of various related working groups, and have proposed language for inclusion in Framework Convention instruments (including compliance with the rights of indigenous peoples).[58] Nonetheless, avenues for indigenous peoples' formal and equal participation in the negotiations remain suboptimal.

[57] Anchorage Declaration of the Indigenous Peoples' Global Summit on Climate Change, held in Anchorage, Alaska, 20-24 April 2009.

[58] See Ad Hoc Working Group on Long-Term Cooperative Action, Non-paper No. 33, "Contact Group on a Shared Vision for Long-Term Cooperative Action", Revised annex 1 to document FCCC/AWGLCA/2009/INF.2, Non-paper by the Facilitator, "Proposed text amendments and additions presented by the International Indigenous Peoples Forum on Climate Change" (Barcelona, 2-6 November 2009).

**The right to self-determination**

61. Self-determination is the key provision in the Declaration from which every other right flows. Its meaning in the indigenous peoples' context varies according to the circumstances of the particular indigenous peoples in question, albeit subject to the principle of equality, and includes how they themselves envisage their claim to self-determination. It can range from full sovereignty and independence, especially where indigenous peoples are in a non-self-governing or trust territory and/or the State acquiesces, to autonomy and self-government under article 4 of the Declaration, to full participation in State political processes. States' territorial integrity is mentioned in article 46, paragraph 1. Common to all interpretations of self-determination is that it has a political dimension and expresses indigenous peoples' claims to determine their own destiny.[59]

62. Where climate change threatens the very existence of indigenous peoples as is possible, for example, in low-lying atoll States, indigenous peoples' right to self-determination, which requires their continuing existence as a peoples, could be undermined altogether, especially if the international community does not provide alternative spaces for indigenous peoples to practice their self-determination. Similarly, competing claims to sovereignty over Arctic areas, especially areas that have become more accessible due to climate change, can undermine indigenous peoples' self-determination.

63. Where international, State or sub-State climate change policies and laws are to apply in areas usually regulated by indigenous peoples' customary laws, conflicts between the customary and non-indigenous laws and policies can arise.[60] Where the non-indigenous laws take precedence over the indigenous laws, at least as a matter of State constitutional or other laws, the application of non-indigenous laws undermine an indigenous peoples' right to self-determination.[60]

64. Policies that are to apply to indigenous peoples or on their territories that do not receive indigenous peoples' input and approval undermine indigenous peoples' self-determination and can aggravate state oppression of peoples.

65. Climate change law and policies can support an indigenous peoples' right to self-determination. For example, if REDD funding goes directly to indigenous peoples, represented by their own authorities under indigenous law, it could be viewed as recognizing the authority of indigenous peoples over their own lands, territories and resources (in this case forests), and their self-determination. Conversely, if REDD funding is channelled through the state and the state does not recognize indigenous peoples' authority over their forests or, contrary to indigenous peoples' claims, support non-indigenous ownership over indigenous peoples' lands, territories and resources, indigenous peoples' self-determination may be perceived to be undermined. Measures that support local government and/or other civil society organizations over indigenous peoples' representative organizations can similarly run the risk of undermining indigenous peoples' self-determination.

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[59] James Anaya, "The right of indigenous peoples to self-determination in the post-declaration era", in C. Charters and R. Stavenhagen (eds.) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs, Copenhagen, 2009).

[60] E. Savaresi and A. Morgera, "Ownership of land, forest and carbon", in J. Costenbader (ed.) *Legal Frameworks for REDD: Design and Implementation at the National Level* (IUCN Environmental Policy and Law Paper No. 77, 2009).

66. The right to self-determination includes the right of indigenous peoples to "freely pursue their economic, social and cultural development". It is supported by article 20, under which indigenous peoples are entitled to "engage freely in all their traditional and other economic activities", and article 23, which articulates indigenous peoples' right to determine and develop priorities and strategies for exercising their right to development, entitling indigenous peoples to also utilize their resources for development. Article 32, paragraph 1, states "[i]ndigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources". In some cases, development could come from the utilization of fossil-fuel resources on indigenous peoples' territories and indigenous peoples' participation in mitigation and adaptation strategies. Climate change law and policy attempting to limit indigenous peoples' use of their resources could undermine their right to self-determination if it is devised without indigenous peoples' participation and, where necessary, consent.

**Rights to lands, territories and resources**

67. The Declaration's provisions concerning land rights include articles 10, 25 to 30 and 32. Broadly stated, they:

- Prohibit the forcible removal of indigenous peoples from their lands without their free, prior and informed consent and agreement on just and fair compensation including, where possible, the option of return
- Articulate the indigenous peoples' right to maintain and strengthen their spiritual relationship with their lands, territories and resources
- Set out indigenous peoples' right to their traditionally owned, occupied or otherwise used or acquired lands, territories and resources
- Express indigenous peoples' right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other use, as well as those which they have otherwise occupied
- Require States to implement processes to recognize and adjudicate indigenous peoples' rights to their lands, territories and resources
- Describe indigenous peoples' right to redress for indigenous peoples' lands, territories and resources which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent
- Set out indigenous peoples' rights to the conservation and protection of the environment, including their lands, territories and resources
- Prohibit military activities in indigenous peoples' lands or territories unless certain criteria are met
- Set out indigenous peoples' right to develop their lands, territories or resources, including the obligation to acquire indigenous peoples' free, prior and informed consent before approving projects affecting indigenous peoples' lands, territories and resources.

68. Indigenous peoples' territories must be interpreted broadly, consistently with indigenous peoples' understanding to refer to "the whole of the symbolic space in which a particular indigenous culture has developed, including not only the land but

also the 'sacred landscape' that corresponds to their world view".[61] Context will determine the extent of indigenous peoples' claims to their territories under the Declaration where non-indigenous persons hold those lands today as a matter of domestic State law but acquired without the relevant indigenous peoples' consent. Context will also be highly relevant in determining the exact redress appropriate for takings of indigenous peoples' lands under article 28. In both cases, indigenous peoples' preferences and understanding of their own entitlements should be paramount considerations. Article 46, paragraph 2, might also be relevant.

69. Measures to clarify indigenous peoples' land title, and to demarcate indigenous peoples' lands, must respect indigenous peoples' customary land ownership practices to comply with the Declaration. Caution is required to ensure that legal tests to establish indigenous peoples' land, territories and resource rights are not restrictive and biased towards non-indigenous conceptions of land ownership, lest they function to unjustly deprive indigenous peoples of their legitimate claims to their territories and resources, including those that they have historically used.[62]

70. Evolving customary international law supports the land rights provisions in the Declaration.[63]

71. In the context of climate change indigenous peoples have stated that "[s]ecuring our rights to our ancestral lands, forests, waters and resources provides the basis for sustainable local social, cultural, spiritual and economic development, and some insurance against our vulnerability to the impacts of climate change".[63]

72. Diminishing indigenous peoples' land areas as a result of climate change, in the case of "sinking" islands and melting ice, highlight the need for international and domestic climate change and policy to aggressively mitigate the impact of climate change, in the interests of realizing the lands, territories and resource rights in the Declaration. The loss of these territories has a significant consequence for other rights also, such as indigenous peoples' traditional activities related to resources, including hunting and fishing.

73. The potential synergies between climate change mitigation and the protection and promotion of indigenous peoples' rights to their lands, territories and resources is apparent in the Inter-American Court of Human Rights decisions in *Awas Tingni v. Nicaragua* and *Saramaka v. Suriname*, where indigenous peoples successfully sought recognition of their land rights in a situation where they were the subject of unauthorized (by the peoples) logging concessions.[63]

74. Indigenous peoples' land, territories and resources are particularly vulnerable to climate change policies and laws, especially where land title remains to be vested in them or is otherwise uncertain or challenged. Climate change policies to build dams and wind farms, to invest in trees, to plant for biofuel, for example, can all create incentives to deny recognition to indigenous peoples' lands and relocate them.[65] A native title lawyer has noted that emissions trading schemes may "further

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[61] A. Regino Montes and G. Torres Cisneros, "The United Nations Declaration on the Rights of Indigenous Peoples: the foundation of a new relationship between indigenous peoples, State and societies" in C. Charters and R. Stavenhagen (eds.), footnote above.

[62] A. Erueti, "The demarcation of indigenous peoples' traditional lands: comparing domestic principles of demarcation with emerging principles of international law", *Arizona Journal of International and Comparative Law*, vol. 23, No. 3 (2006).

[63] See footnote 15 above, para. 11.

decrease indigenous peoples' rights and interests in land, through extinguishment of native title and loss of access to the use of natural resources. Native title is [...] susceptible to extinguishment".[64]

75. Conversely, secure and clear indigenous peoples' land and forestry rights can better facilitate their retention, which can be positive from a REDD perspective, and have been considered an indicia of a State's readiness to implement REDD policies.[65]

**Right to free, prior and informed consent**

76. The right to free, prior and informed consent is closely related to indigenous peoples' self-determination and other human rights obligations, especially the right to participation. It has been endorsed in numerous findings by, for example, the Human Rights Council, inter-American human rights bodies,[66] the Special Rapporteur on the right to food,[66] the Committee on the Elimination of Racial Discrimination, the Human Rights Committee and the Permanent Forum. Some domestic law has also evolved consistently with the obligation of free, prior and informed consent.[67]

77. The Special Rapporteur on indigenous peoples has commented on the meaning of free, prior and informed consent in the relevant articles of the Declaration (see A/HRC/12/34), and the Permanent Forum detailed elements of free, prior and informed consent at its fourth session.[68] Free, prior and informed consent includes the requirement under article 19 that States consult and cooperate with indigenous peoples through their own representative institutions in order to obtain their free, prior before adopting and implementing legislative or administrative measures that may affect them. Article 32, paragraph 2, imposes a specific free, prior and informed consent requirement to "the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources". Other relevant articles include 10, 11, 15, 17, 18, 28-30, 36 and 38.

78. As has been noted, the inclusion of indigenous peoples in processes that have the potential to affect them is pragmatically beneficial. Moreover, experts on the subject have concluded that free, prior and informed consent processes "could possibly lead towards equitable solutions and evolutionary development which may lead, in their turn, to co-management and decision-making".[69]

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[64] E. Gerrard, "Impacts and Opportunities for Climate Change Indigenous Participation in Environmental Markets", *Native Title Research Units* (2008).

[65] L. Westholm and others, "Assessment of Existing Global Financial Initiatives and Monitoring Aspects of Carbon Sinks in Forest Ecosystems — the Issue of REDD", *Working Papers on Economics*, No. 373 (August 2009), and N. Stern, *The Economics of Climate Change: The Stern Review* (Cambridge, Cambridge University Press, 2007).

[66] United Nations Special Rapporteur on the right to food, *Large-scale land acquisitions and leases: a set of core principles and measures to address the human rights challenge* (2009).

[67] For example, *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511.

[68] See *Official Records of the Economic and Social Council, 2005, Supplement No. 43* (E/2005/43), paras. 69, 86 and 137.

[69] Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (E/C.19/2005/3), para 42.

79. The exact obligations under the free, prior and informed consent provisions of the Declaration differ according to the particular circumstances and issue in question, although indigenous peoples' consent must always be sought.[70] Particular obligations arise also where State decisions affecting indigenous peoples also have a broader impact, "because normal democratic and representative processes usually do not work adequately to address the concerns that are particular to indigenous peoples, who are typically marginalized in the political sphere".[71]

80. Drawing on indigenous peoples' experiences in the past, situations where the right to free, prior and informed consent is likely to arise include, inter alia and non-exhaustively, where the following interests could be impacted:[72]

- Indigenous peoples' lands, territories and resources, including their environment
- Indigenous peoples' rights under a treaty, agreement or other constructive arrangement
- Activities in indigenous peoples' areas, especially relating to extractive industries, development, tourism and dams
- Indigenous peoples' traditional knowledge.

81. Overall, initiatives to seek indigenous peoples' free, prior and informed consent must always be undertaken in good faith.[73] "Free" means that indigenous peoples are under no coercion, intimidation or manipulation.[74] "Prior" means that consent must be sought "sufficiently in advance of any authorization or commencement of activities and that respect be shown for time requirements of indigenous consultation/consensus processes".[75] Full information must be provided such as, in the climate change context, the specific ways in which mitigation and adaptation measures are likely to impact on indigenous peoples as well as the latest scientific information on climate change impacts. It should include accurate information about the nature, size and reversibility of any project, as well as its duration and an assessment of its necessity, and be presented in a manner appropriate for the indigenous peoples in question, bearing in mind that some indigenous peoples prefer oral forms of communication and may only speak their own indigenous language. Opportunities need to be provided for indigenous peoples to debate and deliberate on any proposal that might affect them. In liaising with indigenous peoples, States must be careful to engage with bodies that represent the indigenous people affected, and respect indigenous peoples' institutional and decision-making structures, as required by the Declaration.[75]

82. The Declaration also requires States in international settings, such as under the Framework Convention, to comply with the Declaration's provisions on free, prior and informed consent. Notably, indigenous peoples have objected to various proposed climate change measures unless they comply with the Declaration.

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[70] A/HRC/12/34, para. 47.
[71] Ibid., para. 42.
[72] E/C.19/2005/3, para. 45.
[73] Ibid., para. 47.
[74] Ibid., para. 46 (i).
[75] Ibid., para. 24.